

The State of Texas

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May 21, 2008

Commissioner Rosemary Rodriguez
US Election Assistance Commission Executive Director
1225 New York Ave. NW – Suite 1100
Washington, DC 20005

RE: MODIFYING ADVISORY OPINION 07-003-A - MAINTENANCE OF EFFORT (MOE)

Dear Commissioner Rodriguez:

As the EAC examines its policy position on the maintenance of effort (MOE) obligation required by the Help America Vote Act (HAVA), specifically requiring expenditures incurred by local entities to be factored into the state's MOE baseline, we are reminded of and appreciate the fact that the EAC must ensure that the administration of the HAVA funds is within the parameters created by Congress as well as those imposed by applicable federal regulations. Having considered that, I believe the EAC can meet this obligation without imposing unnecessary burdens on the states as well as local governments. I urge you and your fellow Commissioners to consider a variety of factors as you deliberate on this important policy analysis.

The EAC staff has speculated on the intent of Congress regarding MOE. That speculation has resulted in EAC interpretations that do not favor the states and, frankly, the taxpayers. Is it possible that Congress included MOE in HAVA as a standard practice and precaution rather than based on serious concern that the states would use HAVA funds to supplant pre-existing state or local funding levels? The EAC should also be reminded that the Requirements Payments amount to short-term funding for a long-term mandate for which the states and local governments will ultimately be financially responsible. Moreover, Congress has only appropriated approximately 80% of the authorized Requirements Payments.

Keeping in mind the states received little to no guidance on the administration and management of the HAVA funds, judgment and consideration of various provisions of HAVA, including MOE, were left primarily to the states. Given the late timeframe, to deviate or ignore that reality is not practicable for the EAC or the states. The EAC could make the case to Congress that due diligence has been exercised by the states through the execution of their state plans and by the EAC through their audits. Of all of the EAC audits conducted to-date, none have indicated a lack of maintenance of effort. Surely, Congress, its investigative arm (GAO), and the EAC can recognize the time and expense that will be required of the states and the EAC and now, potentially, local governments around the country to factor in local expenditures in each state's MOE baseline, which not only doesn't benefit the taxpayers it diverts valuable resources away from other more important state and local government functions.

In addition, just this afternoon, Commissioner Hillman has proposed a New Advisory 07-003-B. This proposed advisory raises new issues and questions that require more study before any policy is adopted. Apparently, states that choose to grant funds to local governments will be held to a different standard than states that purchase equipment for local government use. Should states be treated differently based on the process they choose to implement HAVA when the end result is the same? I'd like to remind the EAC that its own staff raised fairness as an issue in its April 14, 2008 memo on the proposed MOE advisory change.

Furthermore, the proposed advisory does not clearly define how MOE is determined. Does it refer to expenditures made for federal elections only, which also illustrates an equity issue in the application of MOE? For example, states and, potentially, local governments whose base fiscal year is 1999 will have less of a maintenance effort. It is unlikely that it was Congress' intent to apply MOE so disparately. Does MOE refer to expenditures made for requirements within Title III of HAVA? Although the proposed advisory references Title III, the requirements are described so broadly that they would include non-HAVA election duties. Until these and other questions are answered, the EAC should not make any determinations about requiring demonstrations of MOE by local governments.

Please reconsider Vice Chair Hunter's recommendation to amend the MOE advisory. Further, I urge the Commission and the EAC staff to work toward an advisory that is technically sound while not creating undo burdens on the state and local governments and, most importantly, best serves the taxpayers and voters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ann McGeehan".

Ann McGeehan
Director of Elections
Texas Secretary of State

Cc: Caroline Hunter, Vice-Chair, U.S. Election Assistance Commission
Gracia Hillman, Commissioner, U.S. Election Assistance Commission
Donetta L. Davidson, Commissioner, U.S. Election Assistance Commission